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Supreme Court, U.S.
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No. 00-999

In The

Supreme Court of the United States

WILLIAM WARD d/b/a
BOURBON STREET SOUTH,

Petitioner,

vs.

COUNTY OF ORANGE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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26 pp

QUESTIONS PRESENTED

1. Whether the definition of "adult performance establishment" in the Orange County Adult Entertainment Code is constitutional on its face, even though the definition places the burden of proof on the business in the licensing context to prove that the "predominant business or attraction of the establishment" is not "intended to provide sexual stimulation or sexual gratification?"

2. Whether the definition of "adult performance establishment" is constitutional on its face even though it applies to establishments that sell to customers slow dances with workers who are not nude?

3. Whether the definition of "sexual stimulation" or the undefined term "prurient interest" used within the definition are unconstitutionally overbroad or vague when read in context of the entire definition and the Adult Code?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. Bourbon Street Sold "Sweetheart Party Packages" 1

B. This Case is Essentially a Zoning Dispute 1

C. During Public Hearings Concerning the Adoption of Amendments to the Adult Code, Orange County Considered Evidence of the Adverse Secondary Effects of Businesses Such as Bourbon Street 2

D. Orange County Never Enforced the Adult Code Against Ward or His Business, Bourbon Street ... 4

E. Because the Facial Constitutionality of the Challenged Definitions is a Question of Law, the Deposition Testimony is Irrelevant 6

F. Ward's Far-Fetched, Hypothetical Applications of the Adult Code are Speculative and Improbable .. 6

G. Bourbon Street Can Operate Lawfully 7

REASONS FOR DENYING THE WRIT 7

I. It is Proper to Shift the Burden of Proof to the Business in the Licensing Context 9

A. The Eleventh Circuit's Ruling Followed *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) 10

TABLE OF CONTENTS – Continued

Page

B. Contrary to Ward's Claim, *FW/PBS* Properly Applies Because the Adult Code Does Not Regulate Pure Speech 11

II. The Adult Code is a Reasonable Time, Place or Manner Regulation Even As Applied to Establishments Where the Workers are Clothed 11

A. The Eleventh Circuit's Ruling Followed *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) 11

B. The "Adult Entertainment" Industry Has Not Limited Itself to Businesses That Offer Nude or Semi-Nude Dancing 13

C. Slow Dancing for Money is Not Protected by the First Amendment 15

III. The Definition of the Term "Sexual Stimulation" is Neither Unconstitutionally Vague Nor Overbroad 16

CONCLUSION 18

APPENDIX – Excerpt of Bourbon Street's Menu ... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Brockett v. Spokane Arcades, Inc.,
472 U.S. 491 (1985) 16-17

BSA, Inc. v. King County,
804 F.2d 1104 (9th Cir. 1986) 11, 16

City of Dallas v. Stanglin,
490 U.S. 19 (1989) 15

City of Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986) 8, 11-14

DLS, Inc. v. City of Chattanooga,
107 F.3d 403 (6th Cir. 1997) 16

Elrod v. Burns,
427 U.S. 347 (1976) 17

Freedman v. Maryland,
380 U.S. 51 (1965) 9, 11

FW/PBS, Inc. v. City of Dallas,
493 U.S. 215 (1990) 8-11

Hang On, Inc. v. City of Arlington,
65 F.3d 1248 (5th Cir. 1995) 15

IDK, Inc. v. County of Clark,
836 F.2d 1185 (9th Cir. 1988) 16, 17

Sable Communications of California, Inc. v. FAA,
492 U.S. 115 (1989) 17

SDJ, Inc. v. City of Houston,
636 F. Supp. 1359 (S.D. Tex. 1986),
aff'd, 837 F.2d 1268 (5th Cir. 1988),
cert. denied, 489 U.S. 1052 (1989) 16

TABLE OF AUTHORITIES – Continued

Page

Stansberry v. Holmes,
613 F.2d 1285 (5th Cir. 1980),
cert. denied, 449 U.S. 886 (1980) 16

United States v. Raines,
362 U.S. 17 (1960) 17

STATEMENT OF THE CASE

A. Bourbon Street Sold "Sweetheart Party Packages."

Bourbon Street South ("Bourbon Street") was a business that sold slow dances with girls for money. Bourbon Street's menu lists various "Sweetheart Party Packages" that could be purchased for a cost of up to $200. Those packages provided the customer with "V.I.P. privileges" and "the Hostess of [his] choice." An excerpt of Bourbon Street's menu is attached hereto in **Appendix A.**

B. This Case is Essentially a Zoning Dispute.

As shown by a plain reading of the Orange County Adult Entertainment Code ("Adult Code"), the suggestion by William Ward ("Ward") d/b/a Bourbon Street that the definition of "adult performance establishment" regulates or censors pure speech is totally incorrect.

The Adult Code is essentially a zoning regulation that requires adult entertainment establishments to locate in properly zoned areas subject to distance restrictions. *R7-111-Orange County Code ("OCC"), Chapter 3.*[1] The types of adult entertainment establishments that are subject to the zoning and distance restrictions are defined in section 3-6 of the Adult Code, including "adult performance establishment." *Id.*

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[1] Citations to the record will be denoted by an "R" followed by the volume number, the docket number, a brief description of the item, and the page number.

As found by the District Court, the Adult Code neither bans nor prohibits adult entertainment establishments, including adult performance establishments. *Petition, 26a-27a.* As a matter of fact, Ward himself applied for and received several adult entertainment licenses for other adult performance establishments in Orange County. *Petition, 22a, n.7.*

C. During Public Hearings Concerning the Adoption of Amendments to the Adult Code, Orange County Considered Evidence of the Adverse Secondary Effects of Businesses Such as Bourbon Street.

Ward incorrectly stated that the County did not consider the adverse secondary effects associated with businesses such as Bourbon Street when it adopted the Adult Code. In fact, in the Order attached to Ward's Petition, the United States District Court found:

> Orange County held over thirty public hearings "pertaining to the adult entertainment industry and sexually oriented business" at which secondary effects were considered. *See* (Doc. No. 167, Pretrial Statement, Admissions, at 8-10). Orange County also held several public hearings on the secondary effects, including prostitution, lewd behavior, and urban decay, specific to "swimsuit clubs." *See id.* at 9-10. Finally, during a public hearing on June 23, 1998, Orange County considered evidence that Bourbon Street in particular was a source of harmful secondary effects. *See id.* at 11.

Petition, p. 30a.

Further, a review of the evidence submitted to the Orange County Board of County Commissioners during the public hearing included the following information that was also noted by the District Court in its opinion:

> [A]n agent of the Metropolitan Bureau of Investigation ("MBI") . . . averred that the Sweethearts at Bourbon Street "would rub their bodies against their male customers, press their genitals against those of the customers, expose their breasts, expose the lips of their vaginas, expose the cleavage of their buttocks, allow the customers to fondle their buttocks and exposed back, and often times would place their hands underneath the customer's shirt or fondle the customer's buttocks" while "slow dancing" with customers. *See* (Doc. No. 43, Winsett Aff., ¶ 4(e)). Additionally, Sweethearts would dance on an elevated stage when they were not slow dancing with customers. . . . During these solo dances, the Sweethearts "simulated or actually engaged in masturbation of themselves or displayed their buttocks, genitals, or breasts." *Id.*
>
> Orange County also submitted the affidavit of Frank D'Amico, a former employee of Bourbon Street. *See* (Doc. No. 44, Exh. A). During his employment, Mr. D'Amico "observed female dancers have their hands inside men's pants or have a towel over a male's penis and proceeded to masturbate [*sic*] him. Also[,] male customers were permitted to fondle females[']' breasts and their pubic area." *Id.*

Petition, pp. 19a-20a (footnote and citations omitted). *See also*, R7-112, Notice of Filing Ordinance 98-15, Tabs 2-6 & 2-8.

The District Court also noted that:

> Another former employee of Bourbon Street, Ramona Alma Fields, asseverated that she masturbated male customers while they digitally fondled her vagina. (Doc. No. 57, Exh. 3-A). Ms. Fields claims that she was instructed to do so by the management of Bourbon Street. . . . Ms. Fields also stated that management observed her masturbating customers almost every night that she worked. . . . Ms. Fields claims that she saw a dancer engage in sexual intercourse with a customer inside Bourbon Street and that she saw other dancers perform fellatio on customers. . . .

Petition, p. 21a (footnote and citations omitted). *See also*, R3-56, Tenth Notice of Filing Affidavit, Exhibit A.

D. Orange County Never Enforced the Adult Code Against Ward or His Business, Bourbon Street.

Because the record clearly shows that Orange County government, through its Code Enforcement Department, did not enforce the Adult Code against either Ward or Bourbon Street, Ward did not and could not describe any specific facts regarding any application of the Adult Code to either himself personally or his business, Bourbon Street. The United States District Court found that:

> Mr. Ward has not applied for an Orange County adult entertainment license from Orange County. . . . [C]ode inspectors from Orange County have never cited Mr. Ward or Bourbon Street for a violation of the Adult Entertainment Code. . . . Moreover, Orange County's Code Enforcement Board has never held a code

> enforcement proceeding or taken any action against Mr. Ward or Bourbon Street. . . . Finally, Orange County has never filed a lawsuit against Mr. Ward or Bourbon Street seeking to enjoin actions in violation of the Adult Entertainment Code at Bourbon Street. . . .

Petition, pp. 22a-23a (citations and footnote omitted).

Although there were arrests at Bourbon Street, the arrests were of individuals who were either independent contractors or employees of a non-party corporation. The District Court found in pertinent part that:

> The managers and employees who worked at Bourbon Street were employed by Centerfold Management Team, Inc., which is not a party to the lawsuit. . . . Moreover, such employees were not directly employed by Mr. Ward and, instead, were paid by Staff Leasing Corporation with which he contracted for services. . . . In addition, the dancers at Bourbon Street were independent contractors who were not paid a salary or wage by Mr. Ward. Finally, Mr. Ward did not file Form 1099s with the Internal Revenue Service for such dancers. . . .

Petition, p. 22a (citations omitted).

Moreover, Ward stated that "Ward has no personal knowledge of the facts and circumstances surrounding the arrests at [Bourbon Street South] because he wasn't there." *R10-167, Pretrial Statement, p. 13, para. 41.* Also, due to Ward's failure to respond to Orange County's discovery requests, the Court ordered the following fact to be established:

> [Ward] knows of no facts supporting his position that the arrests for operating an adult entertainment establishment without a license infringes on a constitutional right.

R8-137, Order, p. 3.

In light of the above, the issues before this Court are limited to the facial constitutionality of the definitions of "adult performance establishment," "sexual stimulation," and "sexual gratification." There is no "as-applied" challenge and no "as-applied" facts before this Court.

E. Because the Facial Constitutionality of the Challenged Definitions is a Question of Law, the Deposition Testimony is Irrelevant.

The facial constitutionality of the definitions of "adult performance establishment," "sexual stimulation," and "sexual gratification" is a question of law, not a question of fact. Although Ward asserted an "as-applied" challenge, that issue is not properly before this Court.

Ward's solicitation of thoughts or lay opinions about the meaning of these defined terms does not amount to either evidence or legal precedent. Hence, the deposition testimony is irrelevant.

F. Ward's Far-Fetched, Hypothetical Applications of the Adult Code are Speculative and Improbable.

In his Petition, Ward conjured up some far-fetched hypothetical situations, and claims that certain restrictions in the Adult Code would somehow be instantly

"triggered" based upon a conversation between an employee and a customer. Those speculative, hypothetical situations do not amount to legal reasoning or argument, and do not change the applicable standard of review of laws and ordinances.

Ward could not argue that an actual application of the Adult Code was unconstitutional and was forced to conjure up hypothetical scenarios, since Orange County government never applied the Adult Code to Ward or Bourbon Street.

G. Bourbon Street Can Operate Lawfully.

The property owned by Ward can be legally operated in accordance with the designated uses set forth in the Zoning Code. Contrary to Ward's argument that Bourbon Street will be forced to close, Ward's property can be utilized for other properly zoned and legally allowable uses.

REASONS FOR DENYING THE WRIT

As stated by the District Court, "[t]his case is essentially a zoning dispute." *Petition*, p. 26a. A plain reading of the Adult Code shows that the Adult Code imposes reasonable zoning and distance restrictions. The Adult Code does not censor pure speech or ban adult performance establishments, contrary to Ward's claim. In fact, Ward himself applied for and received several adult entertainment licenses for adult performance establishments in Orange County.

Ward's Petition for Writ of Certiorari should be denied for the following reasons. First, this Court has held that it is proper to shift the burden of proof to the applicant in the licensing context. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

Second, the Adult Code, including the definition of "adult performance establishment," is a reasonable time, place or manner regulation that meets the requirements set forth in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), even though the workers at Bourbon Street do not allegedly work in the nude. Contrary to Ward's argument, the constitutionality of the Adult Code does not hinge upon the state of dress of the workers at a business. In accordance with the applicable standard set forth in *Renton*, the record shows that the purpose of adopting the Adult Code was, at least in part, to combat the negative secondary effects associated with adult establishments. The record also shows that Orange County relied upon studies that were presented to the Board of County Commissioners as well as its own first hand experience dealing with the adverse secondary effects associated with adult establishments, including businesses such as Bourbon Street.

Further, Ward did not "dispute that the ordinance is narrowly tailored and leaves open reasonable alternative avenues of expression." *Petition*, p. 6a, n.3. Hence, Ward is foreclosed from raising this issue here.

Lastly, the term "sexual stimulation," used within the definition of "adult performance establishment," is neither unconstitutionally overbroad nor vague. Ward has failed to show that the application of the Adult Code

would be unconstitutional in a substantial proportion of the cases. *Petition*, p. 11a. Also, similar terms have been upheld against constitutional challenges.

I. It is Proper to Shift the Burden of Proof to the Business in the Licensing Context.

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), the United States Supreme Court concluded that "the First Amendment does not require that the city [of Dallas] bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court." The *FW/PBS* Court held that the Dallas licensing scheme was significantly different from the censorship scheme examined in *Freedman v. Maryland*, 380 U.S. 51 (1965). The Court distinguished *Freedman* as follows:

> In Freedman, the censor engaged in direct censorship of particular expressive material. Under our First Amendment jurisprudence, such regulation of speech is presumptively invalid and, therefore, the censor in Freedman was required to carry the burden of going to court if the speech was to be suppressed and of justifying its decision once in court. . . . The court in Freedman also place the burdens on the censor, because . . . the censor's decision to suppress was tantamount to complete suppression of the speech. . . .

FW/PBS, 493 U.S. at 229. With respect to a licensing scheme, the *FW/PBS* Court noted:

> Under the Dallas ordinance, the city does not exercise discretion by passing judgment on the

> content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid. . . . The license applicants under the Dallas scheme have much more at stake than did the motion picture distributor considered in Freedman, where only one film was censored. Because the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue the license denial through court.

FW/PBS, 493 U.S. at 229-30.

A. The Eleventh Circuit's Ruling Followed *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

Accordingly, the Eleventh Circuit, after reviewing the Adult Code and the challenged terms, quoted and properly followed *FW/PBS*:

> [T]he plurality emphasized the differences between a censorship scheme and a licensing scheme. . . . [U]nder a licensing scheme, a "city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." *Id.*

Petition, p. 9a. Thus, the Eleventh Circuit concluded that in the licensing context it was proper to shift to the applicant the burden of proving that the "predominant business or attraction of the establishment" is not "intended to provide sexual stimulation or sexual gratification." *Petition*, pp. 10a-11a.

B. Contrary to Ward's Claim, *FW/PBS* Properly Applies Because the Adult Code Does Not Regulate Pure Speech.

Ward is incorrect in claiming that the definition of "adult performance establishment" is a regulation of "pure speech." The Adult Code does not ban or prohibit adult entertainment establishments. In fact, Ward himself applied for and received several adult entertainment licenses for other adult performance establishments in Orange County and had ample opportunities to operate adult performance establishments in Orange County. *Petition*, 22a, n.7.

Further, the Adult Code does not prohibit or ban dancing or sexual conversations between employees and customers. The Adult Code sets out certain reasonable zoning and distance regulations for businesses where such conduct occurs. *Petition*, 6a & 31a.

Ward's reference to cases that involve censorship schemes, including *Freedman v. Maryland*, 380 U.S. 51 (1965) (motion picture censorship statute); *BSA, Inc. v. King County*, 804 F.2d 1104 (9th Cir. 1986) (ordinance prohibiting public nudity), are inapplicable.

II. The Adult Code is a Reasonable Time, Place or Manner Regulation Even As Applied to Establishments Where the Workers are Clothed.

A. The Eleventh Circuit's Ruling Followed *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

The Eleventh Circuit upheld the constitutionality of Orange County's zoning ordinance under the "time,

place, or manner" standard set forth by Supreme Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). In *City of Renton*, the Supreme Court affirmed the validity of a zoning ordinance prohibiting adult movie theaters from locating within 1,000 feet of residential dwellings, churches, parks or schools.

The Supreme Court first analyzed whether the Renton ordinance should be placed in the content-based or content-neutral category. The Court stated:

> To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless . . . the Renton ordinance is *aimed not at the content* of the films shown at "adult motion picture theatres," *but rather at the secondary effects* of such theaters on the surrounding community.
>
> . . . .
>
> In short, the Renton ordinance is completely consistent with our definition of "content-neutral" speech regulations as those that "are *justified* without reference to the content of the regulated speech."

Renton, 475 U.S. at 47-48 (emphasis added).

Next, the *Renton* Court applied a two-part standard to determine the validity of the content-neutral regulation. The Court found that the Renton ordinance served a substantial governmental interest in that a local government's interest in attempting to preserve the quality of urban life is one that must be accorded high respect, and that a local government is entitled to rely on the experiences of other local governments. *Id.* at 50. Further, the

Court concluded that the Renton ordinance allowed for reasonable alternative avenues of communication.

In this case, the Eleventh Circuit held that the Adult Code was "a valid time, place, or manner regulation under *City of Renton* because it is aimed at combating the harmful secondary effects associated with adult entertainment establishments." *Petition*, p. 6a. Further, the Eleventh Circuit found that Orange County relied upon studies as well as its own first hand experience with the adverse secondary effects associated with adult entertainment establishments, including businesses such as Bourbon Street. Specifically, the Eleventh Circuit held:

> [Orange County] relied on numerous studies and hearings to show that the presence of adult entertainment establishments is associated with negative secondary effects. . . . Furthermore, [Orange County] conducted at least one public hearing that specifically examined the secondary effects of Appellant's establishment. . . .

Petition, p. 6a.

Ward did not challenge the Adult Code with respect to the second prong of the *Renton* test. The Eleventh Circuit stated that "[Ward] does not dispute that the ordinance is narrowly tailored and leaves open reasonable alternative avenues of expression." *Petition*, p. 6a, n.3. Hence, Ward is precluded from raising this issue here.

B. The "Adult Entertainment" Industry Has Not Limited Itself to Businesses That Offer Nude or Semi-Nude Dancing.

Ward makes the simplistic assertion that fully clothed dancing cannot be constitutionally regulated as adult

entertainment. However, the adult entertainment industry has never limited itself to nude (or semi-nude) workers or nude (or semi-nude) dancing. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (movie theaters); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (sexually oriented businesses included adult arcades, adult bookstores or video stores, adult cabarets, adult motels, adult theaters, escort agencies, nude model studios or sexual encounter centers). Further, there is no constitutional or semantic significance to the stand-alone phrase "adult entertainment." The Adult Code is a valid regulation of commercial business conduct and conduct mixed with expression, whether such business is categorized as "adult entertainment" or something else.

Moreover, the record from below documents numerous events which transpired at Ward's business, Bourbon Street, where "fully clothed" workers masturbated customers, where customers fingered the vaginas of "fully clothed" workers, where "fully clothed" workers performed fellatio on customers. *Petition*, pp. 19a-21a. Events such as those confirm the negative secondary effects associated with businesses that sell "slow dances" with "fully clothed" workers.

Further, Ward's claim that the Eleventh Circuit's ruling allegedly allows governments to force *all* businesses that offer dance entertainment to relocate or close stretches the Eleventh Circuit's straightforward application of *Renton*. Hence, the cases cited by Ward to stand for that proposition are inapplicable.

C. Slow Dancing for Money is Not Protected by the First Amendment.

Contrary to Ward's argument, slow dancing is not protected by the First Amendment. In *City of Dallas v. Stanglin*, 490 U.S. 19 (1989), this Court reviewed an ordinance regulating dance halls. The Court reasoned that since the ordinance did not involve either a suspect classification or a constitutional right, the ordinance was constitutional under the rational-basis analysis. The Court stated that "the activity of these dance-hall patrons – coming together to engage in recreational dancing – is not protected by the First Amendment." *Id.* at 25.

Simply calling slow dancing for pay "entertainment," as does Ward, does not make such activity protected First Amendment expression. Some customers or workers might find that engaging in sex with others would be entertaining, but that does not make such activity constitutionally protected expression.

Similarly, commercial touching is not a First Amendment right. In *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1253 (5th Cir. 1995), the Fifth Circuit Court of Appeals held that nude dancers had no First Amendment right to touch patrons and vice versa. The court stated:

> *intentional contact between a nude dancer and a bar patron is conduct beyond the expressive scope of the dancing itself.* The conduct at that point has overwhelmed any expressive strains it may contain. That the physical contact occurs while in the course of protected activity does not bring it within the scope of the First Amendment.

Id. See also, DLS, Inc. v. City of Chattanooga, 107 F.3d 403 (6th Cir. 1997); *BSA, Inc. v. King County,* 804 F.2d 1104, 1111 (9th Cir. 1986).

III. The Definition of the Term "Sexual Stimulation" is Neither Unconstitutionally Vague Nor Overbroad.

The Eleventh Circuit held that the District Court was correct in rejecting Ward's overbreadth challenge because "[Ward] failed to show the application of the [Adult Code] would be unconstitutional in a substantial proportion of cases." *Petition,* p. 11a.

Further, the Eleventh Circuit held that the District Court properly rejected Ward's argument that the terms "sexual gratification" and "sexual stimulation," as used in the Adult Code, are unconstitutionally vague. The Eleventh Circuit stated:

> We, however, have already held that a similar term is not unconstitutionally vague. *See Stansberry v. Holmes,* 613 F.2d 1285 (5th Cir. 1980).

Petition, p. 11a, n.6. *See also, IDK, Inc. v. Clark County,* 836 F.2d 1185, 1198 (9th Cir. 1988) (rejecting a vagueness challenge to the terms "sexual stimulation" and "sexual gratification"); *SDJ, Inc. v. City of Houston,* 636 F. Supp. 1359, 1367 (S.D. Tex. 1986), *aff'd,* 837 F.2d 1268 (5th Cir. 1988), *cert. denied,* 489 U.S. 1052 (1989).

Similarly, Courts have rejected the claim that the word "prurient" is unconstitutionally vague if it is not defined. For example, in *Brockett v. Spokane Arcades, Inc.,*

472 U.S. 491, 505, n.13 (1985), the Supreme Court noted in a footnote that "[a]n obscenity statute that leaves the word 'prurient' undefined, or rather, defined only by case law has been sustained." *See also, IDK, Inc. v. County of Clark,* 836 F.2d 1185, 1198 (9th Cir. 1988).

Moreover, this Court, in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), enumerated the cardinal rules governing the federal courts:

> " '[one], never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " *United States v. Raines*, 362 U.S. 17, 21 (1960). . . . Raines also held that "[kindred] to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."

Id. at 501-02.

Ward cites to several inapplicable or inapposite cases involving pure speech, including *Elrod v. Burns*, 427 U.S. 347 (1976) (involving a discharge or threat of discharge solely for the reason that they were not affiliated with or sponsored by the Democratic Party), and *Sable Communications of California, Inc. v. FAA*, 492 U.S. 115 (1989) (banning indecent and obscene interstate commercial telephone messages). Unlike the laws involved in those cases, the Adult Code does not prohibit or regulate speech.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

SWEETHEART PARTY PACKAGES

HI ROLLER CHAMPAGNE Party Pak 14 Blue Party Tickets	1 Complimentary Bottle of Champagne, V.I.P. Privileges, & the Hostess of your Choice. Additional drinks complimentary	$200.00
V.I.P. WINE Party Pak 10 Blue Party Tickets	1 Complimentary Bottle of Wine, V.I.P. Privileges, & the Hostess of your Choice. Additional drinks complimentary	$150.00
CORPORATE FULL CARAFE Party Pak 7 Blue Party Tickets	1 Complimentary Full Carafe of Wine, V.I.P. Privileges, & the Hostess of your Choice. Additional drinks complimentary	$100.00
SWEETHEART HALF CARAFE Party Pak 3 Blue Party Tickets	1 Complimentary Half Carafe of Wine, V.I.P. Privileges, & the Hostess of your Choice. Additional drinks complimentary	$60.00
SPECIALTY Party Pak 1 Blue Party Ticket	Good for 10 min. party & chat time - or - a 3-song Special 1 Complimentary Specialty Drink	$20.00